



No. 379

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In the Supreme Court of the United States

October Term 1947.

GRAND RIVER DAM AUTHORITY, *Petitioner,*

vs.

GRAND HYDRO, *Respondent.*

On Petition for Writ of *Certiorari* to the Supreme Court
of the State of Oklahoma.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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Opinions Below.

The first opinion rendered in this case by the Supreme Court of Oklahoma is reported at 192 Okl. 693, 139 P. (2d) 798 (R. 88-101). The second opinion is not reported, but will be found at pages 670 to 677 of the printed record, and is attached to petitioner's brief in support of its petition for writ of *certiorari*.

Jurisdiction.

The petitioner's petition for rehearing in the Supreme Court of Oklahoma was denied July 1, 1947 (R. 707).

The petitioner asserts that this court has jurisdiction under Section 237 of the Judicial Code as amended by the Act of February 13, 1925, and the Act of January 31, 1928.

Question Presented.

Whether the Supreme Court of the United States will review on *certiorari* a decision of the highest court of a state in a condemnation proceeding brought to condemn lands on a non-navigable stream where the only question to be reviewed is the action of the state court in applying local law in the determination of the amount of compensation to be paid the condemnee.

Statement.

In addition to the facts appearing in petitioner's statement, we set forth the following:

The petitioner, a sub-division or agency of the State of Oklahoma created pursuant to the provisions of Title 82, Secs. 861-875, O. S. 1941, commenced this action in a state court of Oklahoma on the 17th day of February, 1939, seeking the condemnation of respondent's lands. The petition (R. 32) discloses that the petitioner asserted its right to condemn under the authority granted it by the state statute just cited. Nowhere in the petition was it contended that petitioner was possessed of the right to condemn by virtue of being the holder or owner of a license granted by the Federal Power Commission. As a matter of fact, the license granted to the petitioner was not issued until July 26, 1939 (R. 475).

The petitioner throughout all of the condemnation proceedings involved here continued to maintain its position that its right to condemn was granted under state law. It did not at any point in these proceedings, so far as the right to condemn is concerned, allege or seek to prove any

rights or privileges granted it under its license from the Federal Power Commission. This action must then be recognized and treated as one which arose under the state law and one which was tried in accordance with the provisions of the Constitution of the State of Oklahoma and applicable decisions of the Supreme Court of that state.

Although the petitioner obtained its license from the Federal Power Commission within a few months after the filing of the petition and after issues were joined, it has never sought to enlarge the scope of its petition for condemnation by amendment so as to add to it a factual basis for any claim as a federal licensee. There are no allegations that the petitioner made any application to the Federal Power Commission or received any license from it, or that the respondent had never made any application to the Federal Power Commission.

It is true that petitioner in the trial court over objection introduced its license issued by the Federal Power Commission (R. 462) but said license was only offered by the petitioner upon its theory that the existence of said license shed some light upon the measure of just compensation to be allowed respondent for its lands.

After its incorporation in the year 1929 the respondent proceeded to acquire substantial blocks of land on Grand River in Oklahoma for the purpose of constructing a series of hydro electric power dams. The tract of 1462.48 acres of land involved in this case was only part of the land acquired by the respondent (R. 123-127). This tract included all the land necessary to the construction of the dam for which petitioner was issued a license by the Federal Power

Commission.¹ Petitioner's hydro electric project, including this dam, has been completed and placed in operation, at a cost upwards of \$22,000,000.00 (R. 565).

The permit granted to the respondent by the State of Oklahoma found, as required by state law, that respondent had acted in good faith and was financially able to complete its project. (R. 132-133).

The market for power in the area to be served by respondent's proposed project declined in 1930, 1931 and 1932 (R. 121). This temporary decrease in the demand for power caused the respondent to refrain from proceeding with development of its project (R. 121). In the year 1935, after the market had turned upwards, the Legislature of the State of Oklahoma adopted a statute known as the Grand River Dam Authority Act which vested in the petitioner the exclusive right to construct dams upon Grand River, Title 82, Secs. 861-875, O. S. 1941. Respondent could not thereafter proceed with plans for development and in 1938 transferred to the petitioner certain lands, being part of those condemned in this proceeding, necessary to the beginning of construction of petitioner's project, and also transferred to the petitioner rights of entry to other lands, being part of those herein involved, necessary to such construction (R. 141, 672). These transfers of lands and rights of entry were made upon the express agreement that they would not prejudice respondent's rights in the event condemnation proceedings should be necessary to the determination of compensation (R. 137, 141).

1. The petition in condemnation shows that the condemned land comprised the site for petitioner's dam (R. 33) and that the respondent owned all of the site lands (R. 39-47).

On January 18, 1938, the petitioner filed its answer and cross bill in a proceeding then pending which was initiated by the City of Tulsa, Oklahoma, for the purpose of determining water rights on Grand River. Petitioner's answer and cross bill alleged among other things the assignment and the ownership by the petitioner of all of the respondent's interest in respondent's permit and license theretofore transferred (R. 210, 211, 213).

Contrary to petitioner's statement no federal question is involved in this case. The question is one as to the measure of compensation, as to which the state court's decision is conclusive, there being no federal constitutional or statutory rights involved. Comments upon the decision of the Supreme Court of Oklahoma and the contentions of the parties is reserved for the argument hereinafter.

The petitioner has not filed a supersedeas bond. This appears to be grounds for summary dismissal of the petition under Rules 36 (2) and 38 (6) of this court. Attention is drawn to Title 82, Secs. 861, 869, and 879, O. S. 1941 (Act creating Grand River Dam Authority) which provides in substance that the credit of the State of Oklahoma is not pledged to the payment of any judgment obtained against the Authority in condemnation or otherwise. The petitioner has provided no bond securing the payment of the judgment obtained below and indeed has filed no security providing for the payment of costs in this action. The Supreme Court of Oklahoma in *GRDA v. Grand-Hydro*, 111 P. (2d) 488, 188 Okl. 506, has held that petitioner occupies the status of a private litigant and that it must bear all of the burdens which fall upon private litigants. It would appear therefore

that respondent is entitled to the protection afforded by the rules of this court just above referred to.

The only substantial question presented by the petitioner to the Supreme Court of Oklahoma was the one which formed the question of the proper measure of damage or compensation to be paid respondent for its lands. This single question was decided by the Supreme Court of Oklahoma, as evidenced by its opinions contained in the record, in accordance with well established principles of local law.

ARGUMENT.

The decision below is correct. No ground for review by this court is presented.

In its first opinion (R. 88-101) the Oklahoma Supreme Court set forth the general rules governing the determination of compensation in eminent domain proceedings, including the rule that value for the special purpose of the taker cannot be shown. In response to petitioner's argument that by virtue of the Grand River Dam Authority Act no one but the petitioner could build a dam on the Grand River and therefore the adaptability of the land for use as a dam site could not affect the amount of compensation, the court reviewed the state law and held that Grand Hydro's state permit was valid in its inception, had not expired and that by the agreement made between petitioner and respondent at the time the latter transferred to the former the said lands and rights of entry, the petitioner and the respondent "specifically excluded from the issues in that

case (*City of Tulsa v. Grand Hydro*) any question pertaining to the rights and claims of Grand Hydro growing out of its permit * * * the question of compensation for every claim, whether by purchase or by condemnation, was specifically reserved * * *." The court held that petitioner was bound by its said agreement. The court then held that it was proper for evidence to be introduced showing the adaptability of the land for use as a dam site, as one of the uses to which the land could be put and which would aid in determining the value of the land taken. At no place in the opinion is there any reference to the Federal Power Act or the Federal Power Commission, and the opinion clearly appears to be confined to matters of state law.

On the second appeal of this case the Supreme Court of Oklahoma (R. 670-677) determined that its first opinion was the law of the case. The court was of the opinion that petitioner's attempt to show that the first opinion was not the law of the case was predicated upon certain facts, claimed by the petitioner to be new facts, including the petitioner's possession of a permit from the Federal Power Commission. The court stated that petitioner's effort thus to escape the effect of the prior decision as the law of the case amounted only to an attempt by the petitioner to show that the value of the land as a dam site was for the special purpose of the taker, the only party who could use it for that purpose. The court pointed out that the authorities relied upon by the petitioner in advancing this proposition were all distinguishable because the use of this land for a dam site on Grand River "was in the nature of a business enterprise and the condemnee was also possessed of the

power of eminent domain." The court held that it must reject petitioner's argument that the enactment of the Grand River Dam Authority Act in 1935 by the Oklahoma legislature forfeited respondent's permit because, if that statute did forfeit the permit, the statute would be unconstitutional under Article 11, Section 24 of the State Constitution. The court held that the testimony of the expert witnesses as to value influenced by adaptability to use as a dam site was admissible. The court then said:

"Although the Authority had been granted a license by the Federal Power Commission granting it the exclusive right to use the 417-acre tract as a dam site, it could not thereby take private property without just compensation. Nor was the issuance of such license intended to have that effect because the plain provision requires the licensee to pay all damages to the property of others caused by the construction, operation and maintenance of the project." (R. 676)

The state court has never held, although petitioner repeatedly claims that it did, that the petitioner had no right to place a dam on this land even though it held a license from the Federal Power Commission. The petitioner's right to construct the dam and to operate the project is not an issue in this case. Such right long since has been exercised by the actual completion and operation of petitioner's project. Nevertheless, in its second opinion the Supreme Court of Oklahoma expressly recognized petitioner's right under its federal license.

The Supreme Court of Oklahoma has never held that the respondent had the right to build a dam on Grand River

2. "Private property shall not be taken or damaged for public use without just compensation. * * *" Art. II, Sec. 24, Oklahoma Constitution.

without obtaining either a license from the Federal Power Commission or the determination of that body that the interests of interstate commerce would not be affected. The Oklahoma court has always recognized in this case that the only person who has the right to develop this site is the petitioner.

The state court has effectuated the exclusiveness of the petitioner's right to develop by sustaining this condemnation suit, entering judgment wherein it appropriates the land to the petitioner (R. 652). The state court merely has decided, in respect only to the measure of compensation, that respondent was entitled to show adaptability of the land to use as a dam site despite the fact that petitioner became the only person that could so use it by virtue of the federal license.

The state court in effect simply recognized that neither respondent's failure to develop the property before 1935, when the Grand River Dam Authority Act was enacted, nor its failure theretofore to apply to the Federal Power Commission coupled with its inability, in view of the state statute, thereafter so to apply to the Federal Power Commission, affected petitioner's right to show the adaptability to, and the reasonable probability of, development as a dam site within the reasonably near future.

This court will accept as final the ruling of the state court of last resort on all matters of state law. *Fox River Paper Co. v. Railroad Commission*, 274 U. S. 651, 655, 71 L. ed. 1279, 1283.

The determination of property rights and the measure of compensation are governed by state law. *Ford & Son v.*

Little Falls Fibre Co., 280 U. S. 369, 74 L. ed. 483; *Fox River Paper Co. v. Railroad Commission*, *supra* (274 U. S. at 655, 71 L. ed. at 1283); *United States v. Powelson*, 319 U. S. 266, 279, 286, 87 L. ed. 1390, 1400, 1404; *First Iowa Hydro-Elec. Coop. v. Fed. Power Comm.*, 328 U. S. 152, 178, 90 L. ed. 1143, 1157; *U. S. v. Central Stockholders Corp.*, 52 F. (2d) 322; *Union Electric Light & Power Co. v. Snyder Estate Co.*, 65 F. (2d) 297; *Great Northern Paper Co. v. Washington Ry. Co.*, (Sup. Ct. Wash.) 86 P. (2d) 208; *Grand River Dam Authority v. Board of Education*, 193 Okl. 551, 147 P. (2d) 1003, *cert. denied* 322 U. S. 733, 88 L. ed. 1568; *Feltz v. Central Nebraska Public Power & Irrigation District*, 124 F. (2d) 578.

The Grand River is non-navigable. The condemnor is not the United States. Therefore the holding of this court in the case of *United States v. Chandler-Dunbar*, 229 U. S. 53, has no application in this case.³

Even if the United States were the condemnor, the doctrine of the *Chandler-Dunbar* case would not be applicable to the case of a non-navigable stream. *U. S. v. Powelson*, *supra*; same case on remand, 138 F. (2d) 343 (*cert. denied*, 321 U. S. 773, 88 L. ed. 1067). In the *Powelson* case the Circuit Court of Appeals for the Fourth Circuit construed the opinion of this court as permitting a showing of value due to adaptability for water power purposes and this construction was approved by this court's denial of petition for *certiorari*. This result was reached despite the fact that

3. "We may put out of view altogether the class of cases which deal with the right of riparian owners upon a non-navigable stream to the use and enjoyment of the stream and its waters. The use of the fall of such a stream for the production of power may be a reasonable use, consistent with the rights of those above and below." *United States v. Chandler-Dunbar Co.*, 229 U. S. 69.

the *Powelson* case was a condemnation proceeding by the United States Government itself. Indeed the result reached in that case appears conclusive against the petitioner in the case at bar because we believe that the record in the *Powelson* case will reveal that the landowner there as here held a valid state permit and did not hold a license from the Federal Power Commission. If the United States itself has been repelled under such circumstances then the petitioner in this case certainly should be repelled.

The petitioner, as a licensee of the Federal Power Commission, is not clothed with the immunities of the United States. *Ford & Son v. Little Falls Fibre Co.*, *supra*; *Susquehanna Power Co. v. State Tax Comm.*, 283 U. S. 291, 75 L. ed. 1042; *U. S. v. Central Stockholders Corp.*, *supra*; *Grand River Dam Authority v. Board of Education of Wyandotte*, *supra*.

It is clear that state laws are controlling as to legal title to lands and the amount of compensation, unless such local laws have been superseded by the Federal Power Act. *First Iowa Hydro-Electric Coop. v. Fed. Power Comm.*, *supra*. But the Federal Power Act does not pertain to the amount of compensation, therefore the state law applicable thereto is not superseded.⁴ It is the intention of Section 10

4. "When this application has been remanded to the Commission, that Commission will not act as a substitute for the local authorities having jurisdiction over such questions as the sufficiency of the legal title of the applicant to its riparian rights, or as to the validity of its local franchises, if any, relating to proposed intrastate public utility service. Section 9 (b) says that the Commission may wish to have 'satisfactory evidence' of the progress made by the applicant toward meeting local requirements but it does not say that the Commission is to assume the responsibility for the legal sufficiency of the steps taken. The references made in Section 9 (b) to beds and banks of streams, to proprietary rights to divert or use water, or to the legal rights to engage locally in the business of developing, transmitting and distributing power neither add anything to nor detract anything from the force of the local laws, if any, on those subjects. In so far as those laws have not been superseded by the Federal Power Act, they remain as applicable and effective as they were before its passage." *First Iowa Hydro-Elec.-Coop. v. Federal Power Comm.*, 328 U. S. 178, 90 L. ed. 1157.

(c) to place upon the licensee the burden of responding in damages to those injured by the project; Sec. 10(c) neither adds to nor subtracts from the liability under the state law, and makes it clear that the granting of the license confers no immunity upon the licensee. *Corrigan Transit Co. v. Sanitary Dist. of Chicago*, 137 F. 851; *Alabama Power Co. v. Smith*, 229 Ala. 105, 155 So. 601.

In this connection, Section 34 of the Federal Judiciary Act of September 24, 1789, Chapter 20 (28 U. S. C. A., Sec. 725)⁵, and the line of cases initiated by *Eric Railroad Company v. Tompkins*, 394 U. S. 64, 82 L. ed. 1188, are persuasive as indicating a general intent of Congress that state laws shall control except where a statute of the Congress otherwise requires or provides. The same intention is reflected by Section 237 (b) of the Judicial Code (28 U. S. C. A., Sec. 344-b), that is, that the Supreme Court of the United States can review by *certiorari* only those cases from the highest state courts in which the validity of a federal statute or treaty has been drawn in question, or the validity of a state statute has been drawn in question on the ground of repugnancy to the Constitution, treaties or laws of the United States, or some federal immunity is asserted. In furtherance of this intention, Rule 38 (5) (a) of this court indicates that this court generally will not grant *certiorari* in such cases unless the state court has decided a federal question of substance not theretofore determined by this court, or in a way probably not in accord with this court's decisions.

5. "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." 28 U. S. C. A., Sec. 725.

Thus, there being no provision of the Federal Power Act, or of any other applicable federal statute, that supercedes the law of the State of Oklahoma as to the respondent's property rights and the value thereof, the pronouncement of the highest court of that state will not be reviewed by this court.

It appears clear that this court has no jurisdiction under Section 237 (b) of the Judiciary Act to review the decisions of the Oklahoma Court; even if it did, it would be reluctant to do so, under Rule 38 (5) (a).

In specific response to the specification of errors relied upon by the petitioner we briefly reply as follows:

Each of petitioner's six points is predicated upon the claim that the Oklahoma court held that the lawful right to use the lands as a dam site was necessary to entitle the respondent to recover a value enhanced by the adaptability of the lands to such use. Petitioner makes this claim despite the decision and action of the state court denying the respondent's right so to use, upholding the petitioner's exclusive right so to use, appropriating the lands to the petitioner, and nevertheless holding that the award of compensation was properly fixed after consideration of adaptability of the lands to such use. It is plain that the state court never intended to enunciate such a broad doctrine as the petitioner persistently ascribes to it; otherwise the petitioner's appropriation of the property would not have been sustained.

The state court simply held that, *for the purpose of determining the amount of compensation*, the state permit was valid at the time of taking, and this was partly by virtue of the petitioner's agreement made at the time of the trans-

fer of the permit to it, and partly by virtue of the holding of the court that the market is not to be taken as restricted, and therefore the market value diminished, by the statute or license that gives the taker the sole right of development. So, here, the issuance to the petitioner of an exclusive federal license left the situation unchanged so far as the determination of compensation was concerned.

Petitioner's point 1 is groundless because of the erroneous predicate that the state court held as claimed by petitioner.

Petitioner's point 2 is groundless for the same reason.

Petitioner's point 3 which asserts that the state court erroneously construed Section 27 of the Federal Power Act, is groundless because the state court did not construe that section at all.

Petitioner's point 4, which asserts that the state court erroneously construed Section 10 (c) of the Federal Power Act, is groundless because the state court correctly construed that section, without specifically mentioning it, when it said, " * * * the plain provision requires the licensee to pay all damages to the property of others caused by the construction, operation and maintenance of the project." Even the cases cited by the petitioner make it clear that neither the Federal Power Act nor the license thereunder conferred any immunity upon the petitioner.

Petitioner's point 5, which asserts that the state court held that Congress has no jurisdiction over Grand River, is groundless because that court did not so hold, but held the contrary.

Petitioner's point 6 asserts that the state court (a) deprived the petitioner of the benefits of its exclusive federal license and (b) permitted the determination of compensa-

tion on the theory that the respondent had the right to construct a project without obtaining from the Federal Power Commission either a license or a declaration that the interests of interstate commerce would not be affected. This is groundless because (a) the state court has not denied respondent any benefit of its federal license and (b) the state court has not held that the respondent could construct a project without such license or declaration of the Federal Power Commission, but simply held that the respondent's case as to compensation was not prejudiced by its non-possession of a federal license.

Conclusion.

The decision below is in accord with the principles announced by this court in *First Iowa Hydro-Electric Coop. v. Federal Power Commission, U. S. v. Powelson, Ford & Son v. Little Falls Fibre Co., supra*, and other applicable decisions.

The state court's decision has not questioned, but has sustained, the validity of the Federal Power Act. The state court has not denied the petitioner any of the benefits of its federal license, but has accorded to petitioner its full rights thereunder.

The petition should be denied.

Respectfully submitted,

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